UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	No. 81-1554
v.	)	DC No. CR-81-007
PETER GOTTHEINER, Defendant-Appellant	)	MEMORANDUM (FILED 8-18-82)

Appeal from the United States District Court for the Northern District of California Lloyd H. Burke, District Judge, Presiding
Argued and Submitted July 13, 1982

Before: CHOY, SNEED, and FARRIS, Circuit Judges.

Gottheiner was convicted by a jury of making false statements to a government agency in violation of 18 U.S.C. §1001 and of making a false application for a bank loan in violation of 18 U.S.C. § 1014. He appeals his conviction claiming that certain defects in the indictment procedure, in the trial judge's admission of evidence, and in the deliberations and polling of the jury require reversal. Because we find that

Gottheiner's grounds for appeal are without merit, we affirm his conviction.

I. Indictment Procedure

Gottheiner challenges the validity of the indictment underlying his conviction on three grounds. First, he contends that the Justice Department's letter authorizing Barry Goldman, one of its attorneys, to conduct the grand jury proceeding was not sufficiently specific to satisfy the requirements of 28 U.S.C. §515(a) and thus Goldman was not properly authorized to obtain the indictment. For Goldman's authorization to have been proper §515(a) requires that he must have been "specifically directed by the Attorney General" to conduct the grand jury proceeding (emphasis added). We hold that although Goldman's authorization was phrased in general terms, it was precise enough to satisfy the specific direction requirement of §515(a). Our holding is supported by decisions of this and other circuits finding that letters of authorization containing similarly-broad language were sufficient

to satisfy §515(a). See United States v. Prueitt, 540 F 2d 995 (9th Cir. 1976), cert. denied, 429 U.S. 1063 (1977); Infelice v. United States, 528 F 2d (7th Cir. 1975); and United States v. Morris, 532 F. 2d 436 (5th Cir. 1976).

Second Gottheiner contends that the prosecutor's failure to instruct the grand jury that knowledge or intent is an essential element of an 18 U.S.C. § 1001 offense warrants dismissal of the indictment. We disagree. This circuit has held that where the indictment is valid on its face, legal instructions from the prosecutor to the grand jury are not required at all. United States v. Kenny 645 F 2d 1323, 1347 (9th Cir.), cert. denied, 452 U.S. 920 (1981). The indictment returned by the grand jury here not only tracks the language of the statute, but contains the appropriate allegations of intent and is clearly valid on its face. The validity of the indictment on its face alone is sufficient to call for a trial on the merits. Costello

v. United States 350 U.S. 359, 363 (1956). Although it may have been desirable for the prosecutor to instruct the grand jury more carefully on the requisite knowledge or intent, his failure to do so does not provide a ground for dismissing the indictment.

Gottheiner's third contention is that the delay of nearly five years between his alleged illegal acts and his indictment prejudiced his right to a fair trial because it deprived him of the testimony of a potential witness. In order to prove that pre-indictment delay requires dismissal of an indictment, a defendant must first show actual, nonspeculative prejudice resulting from the delay. United States v. Stone, 633 F. 2d 1272, 1274, (9th Cir. 1979). This Gottheiner has failed to do. His allegation that the witness' testimony would have been exculpatory is speculative, lacking any significant evidentiary support.

II. Trial Proceedings

Gottheiner also directly challenges the validity of his conviction of two grounds. First, he contends that the admission of witness Ellen Rowley's testimony that Gottheiner had been informed of the fraudulent nature of the January 1976 financial statements was unduly prejudicial and necessitated the declaration of a mistrial. Under Rule 403 of the Federal Rules of Evidence, the trial judge is given discretion to exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice." The trial judge's determination of whether to exclude evidence under Rule 403 is given great deference and may only be reversed upon a showing that the trial judge abused his or her discretion. United States v. Larios, 640 F 2d 938, 941 (9th Cir. 1981). Because we can discern no unfair prejudice in the admission of Rowley's testimony, we hold that it was properly admitted by the trial judge.

Gottheiner's final contention is that a mistrial should have been declared because the jury foreman pressured jurors in their deliberations by refusing to allow them to communicate directly with the judge, and because the jurors were unaware that they could change their vote during the polling of the jury. In support of his claim, Gottheiner submitted affidavits of two jurors who stated that they believed they could not communicate directly with the judge; that they had wished to inform the judge that the jury was deadlocked since they believed Gottheiner was innocent; that the jury foreman pressured them by refusing to relay their message of the deadlock to the judge or to permit the jury to go out deadlocked; that they were unaware that they could have changed their vote during the polling process; and that they would have changed their vote to "not guilty" had they known they could.

In general, jurors may not impeach their verdict. Traver v. Meshriy, 627 F 2d

934, 941 (9th Cir. 1980). This rule is codified in Rule 606(b) of the Federal Rules of Evidence which prohibits jurors from testifying on the validity of their verdict except with respect to questions of extraneous prujudicial information made known to them or outside influence brought to bear on them. The two jurors' allegation that the jury foreman pressured them by refusing to allow them to communicate directly with the judge does not fall within the Rule 606(b) exceptions and cannot properly be considered as evidence of impeachment. See United States v. Barber, 668 F 2d 778, 786-87 (4th Cir. 1982). Moreover, even if the allegation were considered and accepted as true, it would not be sufficient to justify reversing the conviction.

Gottheiner's reliance on the jurors' second allegation that they were unaware that they could change their vote during polling is also misplaced. The jury was properly polled in open court by the judge

and each juror affirmed the verdict. This court has stated that "once a verdict has been delivered and accepted in open court, and the jury is polled and discharged, jurors may not claim that their assent was mistaken or unwilling." Traver v. Meshriy supra, 627 F 2d at 941; see United States v. Weiner, 578 F 2d 757, 764 (9th Cir.), cert. denied, 439, U.S. 981 (1978). The jurors' second allegation thus does not provide a proper basis for impeaching the verdict.

For the foregoing reasons, Gottheiner's conviction is AFFIRMED.

UNITED STATES DEPARTMENT OF JUSTICE
ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION
WASHINGTON, D.C. 20530

Mr. Barry D. Goldman
Criminal Division
Department of Justice
Washington, D.C. 20530

Dear Mr. Goldman:

As an attorney for the Government employed full time by the Department of Justice and assigned to the Criminal Division, you are hereby authorized and directed to file informations and to conduct in the Northern District of California and any other judicial district any kind of legal proceedings, civil or criminal, including grand jury proceedings and proceedings before United States Magistrates, which United States Attorneys are authorized to conduct.

You may file a copy of this letter with the Clerk of the District Court to evidence this authorization.

Sincerely,

Philip B. Heymann
Assistant Attorney General
Criminal Division

By: John C. Keeney
Deputy Assistant Attorney General
(Pursuant to Order No. 725-77, dated May 12, 1977)

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. PETER GOTTHEINER, Defendant-Appellant.	No. 81-1554 DC #CR-81-007 ORDER (FILED 9-27-82)

Before: CHOY, SNEED and FARRIS, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing. The petition for rehearing is denied.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	NO. 81-1554
vs.	)	ORDER
PETER GOTTHEINER, Defendant-Appellant.	)	(FILED 11-15-82)

Before: CHOY, SNEED and FARRIS, Circuit Judges.

Appellant's motion to stay issuance of mandate is denied.

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Petition for Certiorari was mailed postage prepaid to:

Robert G. Clark
United States Department of Justice
P.O. Box 136
Ben Franklin Station
Washington, D.C. 20044-0136

on this 18th day of November, 1982.

KEVIN C. McDONOUGH